IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OHIO A. PHILIP RANDOLPH INSTITUTE, LEAGUE OF WOMEN VOTERS OF OHIO, THE OHIO STATE UNIVERSITY COLLEGE DEMOCRATS, NORTHEAST OHIO YOUNG BLACK DEMOCRATS, HAMILTON COUNTY YOUNG DEMOCRATS, LINDA GOLDENHAR, DOUGLAS BURKS, SARAH INSKEEP, CYNTHIA LIBSTER, KATHRYN DEITSCH, LUANN BOOTHE, MARK JOHN GRIFFITHS, LAWRENCE NADLER, CHITRA WALKER, TRISTAN RADER, RIA MEGNIN, ANDREW HARRIS, AARON DAGRES, ELIZABETH MYER, BETH HUTTON, TERESA THOBABEN, and CONSTANCE RUBIN,	)	No. 1:18-cv-00357-TSB
Plaintiffs,	)	Judge Timothy S. Black Judge Karen Nelson Moore
v.	)	Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz
RYAN SMITH, Speaker of the Ohio House of Representatives, LARRY OBHOF, President of the Ohio Senate, and JON HUSTED, Secretary of State of Ohio, in their official capacities,	)	
Defendants.	)	

DEFENDANTS' POSITION STATEMENT REGARDING DEPOSITIONS

The Court ordered the parties to confer about, among other things, the applicability of the parties' Rule 26(f) report to the intervenors. The parties' principal area of disagreement involves the number of depositions for each side.

Prior to the Court's order, intervenors had attempted to open discussions about the number of depositions. Plaintiffs responded "on this point there is really no room for compromise." (M. Baker email, 8/31/18). During the subsequent Court-ordered meet and confer,

intervenors proposed a reasonable plan—leaving the number of hours for all depositions for each side the same (*i.e.* 175 hours), but increasing the maximum number of depositions for each side from 25 to 35. Plaintiffs did not budge from their earlier position and rejected the proposal. Plaintiffs did not offer any compromise or alternative in return.

To the extent the Court deems this issue ready for decision now, intervenors' proposal makes sense for several reasons. First, after *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018), each plaintiff has an affirmative obligation to prove facts establishing standing. Plaintiffs need to prove through facts and evidence that their claims seek to vindicate an "individual legal interest" and not a "collective political interest." *Id*. at 1932. This Court made it clear in its order on defendants' motion to dismiss that while plaintiffs could survive a motion to dismiss based on their allegations, plaintiffs still need to prove with facts that they have standing. (Dkt. 61) (Order Denying Motion to Dismiss at 13 n.4) (Page ID #665).

Thus, *Gill* has effectively made a deposition of each individual or organizational plaintiff an essential part of discovery. Here there are 22 plaintiffs. This leaves defendants, and now intervenors, with only three remaining fact depositions to split among themselves. *Gill* does not place a comparable practical restraint on how plaintiffs use their depositions. So, as the schedule stands, plaintiffs have 25 depositions to use as they choose, while defendants have constraints on defendants' depositions that are unique to redistricting litigation.

Second, the depositions of the individual plaintiffs are likely to be reasonably short depositions. With intervenors' proposal, defendants are encouraged to keep it that way, to allow some time for a few additional depositions of key witnesses. Importantly, the parties may be able to schedule more than one plaintiff deposition on any single day, and the overall schedule under intervenors' proposal will not change.

Third, when defendants and plaintiffs discussed the number of depositions during the expedited Rule 26(f) process, defendants were not aware of the extensive number of individuals that plaintiffs would later disclose as having discoverable information. Over a week after agreeing to 25 depositions, plaintiffs disclosed over *80 such individuals*. (Plaintiffs' Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (July 13, 2018)). Importantly, despite seven years to prepare their case, plaintiffs did not disclose during the parties' discussions about the discovery plan that they would later identify so many potential witnesses. *See Martin v. Trott Law, P.C.*, No. 15-12838, 2016 WL 9444403 (E.D. Mich. Dec. 20, 2016) (increasing number of depositions following opposing party's initial disclosures). Also, as discovery has progressed, and as defendants have gathered facts and documents, defendants have learned that various individuals played important roles in the development of the 2011 maps that were a compromise between political parties. Typically, in most cases, there is much more time to gather facts and make strategic decisions about depositions and witnesses. Here, in contrast, defendants are working uphill on an expedited schedule, having had only a fraction of the seven-year span plaintiffs have had to plan their case.

Lastly, restricting defendants to deposing only three non-plaintiff fact witnesses puts defendants at a significant disadvantage at trial. Under plaintiffs' 25-deposition plan, plaintiffs will most likely have the opportunity to depose every single defense witness who will be called at trial. In contrast, with only three depositions to spare, defendants will likely see most of plaintiffs' witnesses at trial for the first time. This prejudices defendants and will slow down the trial. If defendants will be limited to a fixed time to put on their case, defendants will need to spend precious time establishing basic foundational points.

Fundamental in our system of dispute resolution is the opportunity to take meaningful discovery. *See Bell Data Network Communs. v. Symbol Techs.*, No. 96-1064, 1997 WL 289685 , *2 (6th Cir. May 29, 1997) (reversing because one party was not afforded an "adequate opportunity for discovery"); *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 232 (6th Cir. 1994) (*quotation and citation omitted)* (stating that an "adequate opportunity to conduct discovery" is essential). Adequate discovery also avoids many problems, including unfair surprise, and it promotes efficient trials.

CONCLUSION

This Court should allow defendants and intervenors to take additional depositions based on the request by intervenors.

This the 12th day of September, 2018.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day served the foregoing upon the following persons via electronic mail:

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Respectfully submitted, this the 12th day of September 2018.

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